

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

ORIGINAL

77-1248

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee.

-against-

EDMUND A. ROSNER,

Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT'S REPLY BRIEF

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ARGUMENT

1. At page 3 footnote,** of its brief, the government asserts that the affidavit of Paul A. Goldberger is not probative and further that appellant has abandoned any reliance on it. The affidavit by Paul Goldberger, Esq. is indeed probative and relevant evidence as it offers an expert's opinion on the credibility of Leuci's testimony at a 1977 trial when the full details of Leuci's activities were made known to the defense and a trial jury and it also sets forth opinions of those juror's as to Leuci's credibility. This evidence is relevant and probative of the effect of the government suppression herein on a jury (see number 6 below).

2. The government's contention, on p. 4 of its brief, that it "immediately" advised appellant of certain information concerning Leuci's criminal activities and perjuries in 1974 is factually inaccurate. As this Court noted, the details of the Richard Lawrence tape and the Leuci confession only came to be known during the pendency of appellant's new trial motion and at the hearing before Judge Bauman. In fact, the Lawrence tape "...only came to light during the final days of the new trial hearing when Leuci made an inadvertent reference to it." 516 F.2d at 272. The government "failed to make Lawrence's allegations available to the defense," 515 F.2d 281, during the pendency of his first new trial motion. It is clear from this Court's prior opinion that the prosecutors' had knowledge of the tape and its contents since shortly after its recording. And the "Goe Memorandum's" contents was known to Assistant United States Attorney Edward Shaw since shortly after July, 1972 (pre-trial).

Whatever disclosure was belatedly made was due to the pendency of court proceedings concerning the information and, clearly some of it was only

obtained inadvertently through the testimony at the hearing. Most of the information the defense obtained first came to light in the media and was then confirmed by the government during the pendency of the motion. This pattern of disclosure hardly qualifies as immediate.

3. The government again mischaracterizes the facts when, on p.5 footnote ***, it says no evidence at the hearing tended to show Leuci lied about anything other than his own criminal activities and appellant's attacks are based solely on Leuci's credibility. Leuci's prior criminal activities and perjury are relevant to appellant's defense of entrapment and provide Leuci with the motive for perjury himself at the trial. Leuci's awareness of what he was hiding and its possible consequences to him made it essential for him to make himself so valuable to the government as a witness and source of information that once the inevitable occurred and the truth surfaced, the government would refrain from taking legal action against him or show him consideration based on his value to them. This could only be accomplished by being successful at his undercover assignments. This issue goes to the heart of appellant's "sole defense" (516 F.2d at 274) of entrapment and, thus, the issue of his guilt or innocence.

4. The government's statement that there was no challenge to Judge Bauman's finding that no government agent was contemporaneously aware of Leuci's perjury (p.5) is again a misstatement of the facts. Judge Bauman and this Court found that agents of the government were contemporaneously aware of the perjury. The "Goe Memorandum" was known to Edward Shaw, who shared the responsibility for the 3500 material in the case, and Nicholas Scoppetta knew of the Lawrence tape since 1971. Appellant's claim of governmental suppression was presented to this Court as part of the appeal:

A second, related issue is also presented. Rosner contends that the government prosecutors were aware of two specific pieces of evidence tending to implicate Leuci in criminal activity, evidence which they did not turn over to the defense before trial and which, if turned over to the defense, would have been useful for impeaching Leuci's credibility. He also contends that the prosecution withheld this evidence and additional impeachment evidence which came to light after trial, during the pendency of appellant's new trial motion.

516 F.2d at 271.

5. The failure to cite F.R. Evid. 606(b), which appellant regrets, is not a critical matter, since the Rule is merely a condification of the existing case law, which was presented and analyzed in appellant's brief. The result is not changed by the enactment of R.606(b).

6. While the Crosby test (government's brief, p. 11) is the test to be applied, appellant submits that the jurors' affidavits are relevant to the application of this test. Certainly it cannot be denied that evidence tending to show the effect of certain information on actual jurors is relevant and probative of the effect on any "hypothetical, average " jurors. The Crosby test cannot be applied in a vacuum. The opinions of those closest to the case must have relevance to a judicial finding of the effect on a hypothetical jury.

7. Appellant denies any impropriety in the juror interviews and believes that any delay in obtaining the affidavits was due to the government's opposition to the motion for permission to interview. Judge Bauman found this issue to be moot in his decision on the new trial motion. During the pendency of the appeal at that denial, counsel for appellant obtained unsworn statements from the jurors similar to those at issue herein. When the motion at bar was being prepared, it was decided that affidavits were necessary and

it was necessary to recontact those jurors.

Further, counsel for appellant consulted bar associations and legal experts to determine if this was proper and was advised to proceed. Judge Wyatt stated at the proceedings on May 11, 1977 that he did not feel there was any question of impropriety, that counsel acted in good faith.

8. Finally, the New York Magazine article points to new facts which reinforce appellant's position that pre-trial an agent of the government (Scoppetta) knew, if not all, more about Leuci's past than was revealed to the defense. These new facts go beyond those found at the hearing before Judge Bauman and require a new hearing as to the true extent of pre-trial government knowledge of, and suppression of, Leuci's past criminal activities.

CONCLUSION

FOR THE FOREGOING REASONS, JUDGEMENT
SHOULD BE REVERSED AND A NEW TRIAL
ORDERED, OR IN THE ALTERNATIVE, THE
CASE SHOULD BE REMANDED FOR AN EVIDEN-
TIARY HEARING.

Respectfully submitted,

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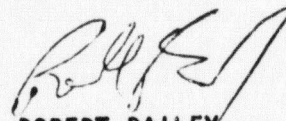
ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 10 day of August 1977 deponent served the within Reply Brief upon
U.S. Atty., So. dist. of NY

attorney(s) for
Appellee

in this action, at

1 St. Andrews Plaza, NYC

the address(es) designated by said attorney(s) for that purpose by depositing
3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 10 day
of August, 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978